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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ERLINDA RIOS et al.,

Plaintiffs and
Respondents,

v.

LUIS TIPACTI,

Defendant and Appellant.

B268521

(Los Angeles County
Super. Ct. No. LC101067)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank J. Johnson, Judge. Affirmed.

The Ekenna Law Firm and Chief Nnamdi A. Ekenna for Defendant and Appellant.

Netzah & Shem-Tov and Shalem Shem-Tov for Plaintiffs and Respondents.

* * * * *

The statute of limitations is an affirmative defense that is forfeited if it is not timely raised. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581; *Vitkievich v. Valverde* (2012) 202 Cal.App.4th 1306, 1314; *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.* (1995) 38 Cal.App.4th 1532, 1548.) In this case, the trial court properly rejected the statute of limitations defense raised at the conclusion of trial. We affirm the judgment.

BACKGROUND

On November 27, 2013, Erlinda Rios and Anna Marie Oseguera sued Luis Tipacti, Sr., requesting repayment of a \$75,000 loan. The complaint included a cause of action for breach of a written contract. Defendant entered a general denial. Defendant asserted the statute of frauds as an affirmative defense and further disputed the allegations in the complaint.

Following the evidentiary portion of a bench trial, counsel argued the case. At the end of the plaintiffs' counsel's argument, the court asked plaintiffs' counsel to address the statute of limitations. Plaintiffs' counsel argued that the issue had been forfeited because defendant did not raise it as an affirmative defense. During his closing argument, defense counsel initially argued that he raised the statute of limitations as an affirmative defense but later conceded that it was not included as an affirmative defense. Specifically, in response to the court's statement that defendant's general denial did "not reference the statute of limitations," defense counsel stated, "Yes. I will concede to that, Your Honor."

The trial court requested supplemental briefing on the statute of limitations. In his supplemental brief, defendant argued that a four-year statute of limitations applied to written contracts. Defendant argued that plaintiffs' claim was not viable

because the statute of limitations had expired before plaintiffs brought this lawsuit. Plaintiffs argued that defendant forfeited the statute of limitations defense by failing to timely raise it.

The court concluded that because “the statute of limitations issue was not asserted as an affirmative defense, or raised as an issue at trial, California law deems the statute of limitations defense waived by the defendant.” The court entered judgment in favor of plaintiffs in the amount of \$75,000.

DISCUSSION

On appeal, defendant argues that the lawsuit is barred by the statute of limitations, and judgment in favor of plaintiffs therefore was improper. We find no error.

The appellate record shows that the statute of limitations was not raised as a defense until after the evidence had been concluded and plaintiffs’ counsel concluded his posttrial argument. The court then inquired about the statute of limitations. Although defendant argues that the minute order suggested that defendant raised the issue of the statute of limitations, whether it was raised by defendant or by the court is irrelevant. The critical issue is whether it was *timely* raised.

Defendant fails to demonstrate the affirmative defense of the statute of limitations was timely raised. A defendant forfeits the defense of the statute of limitations by failing to raise it in an answer or as a ground in a demurrer. (*Minton v. Cavaney, supra*, 56 Cal.2d at p. 581; *Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1233, 1244.) The trial court therefore properly concluded that the issue of the statute of limitations had been forfeited.

Defendant’s argument that the trial court should have sua sponte ordered an amendment of the pleadings after trial is not

persuasive. It is the defendant's obligation to plead and prove affirmative defenses. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 ["a defendant must prove the facts necessary to enjoy the benefit of a statute of limitations"]; *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 424 ["An affirmative defense is new matter that defendants are required to plead and prove."].) The trial court had no sua sponte obligation to order the pleadings amended after the evidentiary portion of trial had concluded.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.